

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 11, 2008 Session

GAY N. CARR v. SCOTT McMILLAN

**Appeal from the Circuit Court for Davidson County
No. 06D1613 Carol Soloman, Judge**

No. M2007-00859-COA-R3-CV - Filed May 14, 2008

The maternal grandmother of a five-year-old child filed a petition seeking visitation pursuant to Tenn. Code Ann. § 36-6-306. She contended she had served as a primary caregiver for a substantial period of time following the death of the child's mother, that cessation of their relationship could interrupt the daily needs of the child, and that the loss of their relationship would cause substantial harm to the child. The child's father opposed the petition. Following a full evidentiary hearing, the trial court granted the petition and awarded the grandmother seventy-eight days of visitation annually. Father appealed contending the trial court erred in finding that the severance of the relationship between the child and his grandmother would result in present danger and substantial harm to the child or that it was likely to occasion severe emotional harm to the child. We affirm the trial court's determination that the grandmother is entitled to visitation.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed in Part; Reversed in Part**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and JERRY SMITH, SP. J., joined.

Wende J. Rutherford, Nashville, Tennessee, for the appellant, Scott McMillan.

Marlene Eskind Moses and John D. Kitch, Nashville, Tennessee, for the appellee, Gay N. Carr.

Robert E. Cooper, Jr., Attorney General and Reporter, and Elizabeth C. Driver, for the State of Tennessee.

OPINION

The child who is the subject of this action was born on October 28, 1999, in Arlington, Texas, to Scott McMillan and his wife Eva McMillan. The child's mother died when he was five years old. The petitioner, Gay Carr, is the mother of Eva McMillan and the maternal grandmother of the child. The child was five years old when his grandmother filed the petition seeking visitation.

At the time of the child's birth, the child and his parents lived in Arlington, Texas, and Mrs. Carr lived in Nashville, Tennessee. While the McMillans lived in Texas, Mrs. Carr visited her grandchild, daughter and son-in-law regularly, typically once a month, and often vacationed with them. She also spent most holidays with the McMillans.

In 2003, the McMillans decided to relocate to Nashville; however, Mr. McMillan was unable to immediately relocate with his wife and child. Thus, Mrs. McMillan and their child moved to Nashville, Tennessee, in the fall of 2003 while he remained in Texas for several months.

Eva McMillan was suffering from a debilitating addiction to prescription medication when she moved to Nashville with their child. By the time she moved to Nashville, her addiction had advanced to the point that it impaired her parenting skills. This circumstance caused Mr. McMillan great concern for the welfare of their child. Fortunately, Mrs. McMillan elected to move in with her mother, Mrs. Carr, when she and the child arrived in Nashville.

During the next several months, Mrs. Carr not only provided housing for the child, she served as a primary caregiver for the child. This was due to the fact Mrs. McMillan's addiction rendered her unable to properly care for her child. Mrs. McMillan's ability to care for the child diminished to such an extent that Mrs. Carr frequently picked the child up from daycare, fed him, bathed him, and put him to bed.

In June of 2004, Scott McMillan moved to Nashville at which time, he, Mrs. McMillan and the child moved into an apartment. Although the child moved out of her home in June of 2004, Mrs. Carr continued to see the child daily because she was responsible for taking him home from daycare. Moreover, she often served as the baby sitter. This routine continued for seven months, until January 21, 2005, when Eva McMillan tragically died of a drug overdose.

On the day of Eva McMillan's death, Scott McMillan accepted Mrs. Carr's invitation for he and the child to reside with her so that she could care for the child, due in part to the fact Mr. McMillan was working two jobs. For the next six months, Mrs. Carr resumed her previous role as a primary caregiver for the child. She picked the child up from daycare every day and she was also responsible for taking the child to the doctor, barbershop, library, zoo, and park. She attended to the child's daily routine, prepared his meals, bathed him, read to him nightly, put him to bed, and comforted him when he cried.

Mr. McMillan was a responsible and caring father, and he spent as much time as he could with the child; however, he was frequently absent. This was due to the fact he worked two jobs and long hours to pay down various debts, including those resulting from his wife's death.

After residing with Mrs. Carr for six months, Mr. McMillan and the child moved into a nearby apartment on July 3, 2005. Although the child had moved out of her residence, Mrs. Carr continued to pick him up from daycare every day, and the child would stay with her until Mr. McMillan got home from work. For the next few months, Mr. McMillan and the child would have dinner at Mrs. Carr's house two to three times a week.

Two months after moving out of Mrs. Carr's home, the relationship between her and Mr. McMillan began to decline as did the frequency of her contact with the child. This change coincided with the commencement of Mr. McMillan's relationship with Frieda Simmons. An unfortunate turn in the relationship between Mr. McMillan and Mrs. Carr occurred in November of 2005, following a remark made to Mr. McMillan by Mrs. Carr concerning Ms. Simmons. Although Mrs. Carr later apologized for making the comment, Mr. McMillan repeated the statement to Ms. Simmons and her teenage daughter. Not surprisingly, Ms. Simmons and her daughter developed harsh feelings toward Mrs. Carr. As a consequence, the relationship continued to deteriorate.

Not fully appreciating the significant problems that were brewing below the surface, Mrs. Carr invited Mr. McMillan and the child to join her for several events during Christmas. Mr. McMillan accepted her invitation and agreed to come to her house for a family Christmas dinner two days before Christmas, for Christmas Eve dinner, a Christmas Eve church service, and to open presents at her house on Christmas morning. Unfortunately, the joy of the season had subsided before all the presents could be unwrapped.

On the first of the three scheduled events, December 23, Mr. McMillan arrived with the child an hour and a half late for dinner. They stayed for dinner and the child opened a couple of his presents; however, Mr. McMillan decided the remaining gifts could be opened on Christmas morning. On Christmas Eve, Mr. McMillan failed to attend the dinner at Mrs. Carr's home. Although he attended the Christmas Eve church service, he did not bring the child. As disappointing as this was for Mrs. Carr, things got worse before they could leave the church. Following the church service, Mr. McMillan attempted to introduce Mrs. Carr to Ms. Simmons' daughter. Unfortunately Ms. Simmons' daughter used the occasion as an opportunity to confront Mrs. Carr with a very inappropriate comment. On the following day, Christmas Day, Mr. McMillan did not bring the child to Mrs. Carr's house to open the remaining presents.

Mrs. Carr did not hear from Mr. McMillan again until he called on January 6, 2006, to ask her to pick up the child because he was running late. Over the next three months, between January 6, 2006, and March 19, 2006, Mrs. Carr saw the child a total of three times. To make matters worse, there were occasions during that time when Mr. McMillan had agreed to bring the child for visits with Mrs. Carr but failed to do so.

In March of 2006, Mrs. Carr hired an attorney to secure visitation with her grandchild. The attorney wrote a letter to Mr. McMillan dated March 30, 2006, seeking his agreement to a visitation schedule and advising him that in the event an agreement could not be reached, further legal action would be taken. The parties failed to reach an agreement. As a consequence, on May 18, 2006, Mrs. Carr filed a Petition to Set Grandparent Visitation.

During the pendency of the action, the trial court awarded Mrs. Carr monthly visitation and ordered Mr. McMillan and Ms. Simmons, whom he had married on July 7, 2006, to complete an online survey for divorcing and divorced parents. Following a full evidentiary hearing on March 20, 2007, the trial court granted Mrs. Carr's petition. The decision to award her grandparent visitation was based upon the following findings:

1. The child's mother had been deceased for over six months at the time of the filing of the Petition;
2. The child had resided in Grandmother's home for twelve months or more prior to the filing of the Petition;
3. A substantial relationship exists between the child and Grandmother;
4. Severance of the relationship between the child and Grandmother would be a "great abuse to the child";
5. Present dangers and substantial harm to the child if there was a cessation of the relationship between the child and Grandmother;
6. It is in the best interest of the child to have visitation with Grandmother.

Furthermore, the trial court awarded Mrs. Carr a total of seventy-eight days of visitation annually pursuant to a detailed visitation schedule.¹ The court also entered an injunction whereby it ordered "[a]ll of the parties" including "the two grandfathers, Father's new wife and the extended families . . . to say nothing negative about any of the other parties or the parties' families." This appeal followed.

ANALYSIS

Mr. McMillan raises four issues on appeal. First, Mr. McMillan challenges the constitutionality of the grandparent visitation statute, Tenn. Code Ann. § 36-6-306. Second, he contends the trial court erred in finding that the severance of the relationship between Mrs. Carr and the child would be a great abuse to the child, would result in present danger and substantial harm to the child, and is likely to occasion severe emotional harm to the child. Third, he contends the visitation schedule is not reasonable and not in the best interests of the child. Finally, he contends it was error for the trial court to issue an injunction against persons who are not parties to this action. We will address each issue in turn.

THE CONSTITUTIONAL CHALLENGE

Mr. McMillan challenges the constitutionality of Tenn. Code Ann. § 36-6-306. We find the issue has been waived because he failed to raise the issue in the trial court.

Mr. McMillan concedes that he failed to timely challenge the constitutionality of Tenn. Code Ann. § 36-6-306 in the trial court; however, he insists the issue is subject to our review because the statute, he contends, is unconstitutional on its face. It is well-established that "questions not raised in the trial court will not be entertained on appeal and this rule applies to an attempt to make a constitutional attack upon the validity of a statute for the first time on appeal unless the statute involved is so obviously unconstitutional on its face as to obviate the necessity for any discussion." *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983) (citing *City of Elizabethton v. Carter*

¹The trial court set out a detailed visitation schedule, resulting in sixty-four days of visitation for the remainder of 2007 and seventy-eight days of visitation for 2008.

County, 321 S.W.2d 822 (Tenn. 1958); *Veach v. State*, 491 S.W.2d 81 (Tenn. 1973); *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978); *Dorrier v. Dark*, 537 S.W.2d 888 (Tenn.1976)).

The Tennessee Supreme Court addressed the constitutionality of the previous grandparent visitation statute under the Tennessee Constitution in *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993). The Court held that “absent some harm to the child . . . the state lacks a sufficiently compelling justification” to interfere with the fundamental right of parents to raise their children as they see fit. *Id.* at 582. After finding the grandparent visitation statute at issue in *Hawk* to be unconstitutional, the Supreme Court advised that a different statutory approach, one that requires a court “to make an initial finding of harm to the child before evaluating the ‘best interests of the child,’” would “prevent judicial second-guessing of parental decisions.” *Id.* at 581.

Following the obvious lead of the Supreme Court, the General Assembly enacted the statute at issue here.² The new statute, the one at issue here, first came under constitutional review in the matter of *Larson v. Halliburton*, No. M2003-02103-COA-R3-CV, 2005 WL 2493478 (Tenn. Ct. App. Oct. 7, 2005). A clear and concise summary of the court’s analysis of the current statute is as follows:

In 1997, the Tennessee General Assembly enacted new statutes governing the visitation rights of grandparents. These statutes explicitly incorporated the Tennessee Supreme Court’s holding in *Hawk v. Hawk* that courts could not grant grandparents visitation with their grandchild over their parents’ objection without proving that the children would be substantially harmed by the denial of visitation. As a result of these statutes, in contests between parents and grandparents, the courts will not override the parents’ visitation decision without a finding of substantial harm to the child. *See Toms v. Toms*, 98 S.W.3d 140, 145 n.5 (Tenn.2003); *Simmons v. Simmons*, 900 S.W.2d 682, 685 (Tenn. 1995).

Grandparents desiring to obtain court-ordered visitation rights with their grandchildren over the objection of their parents must first demonstrate the existence of one of five statutorily defined circumstances. Tenn. Code Ann. § 36-6-306(a).³ Second, they must demonstrate that their grandchild has or will experience “substantial harm” if visitation is not ordered. Tenn. Code Ann. § 36-6-306(b). Finally, they must convince the trial court, using the factors in Tenn. Code Ann. § 36-6-307 (2001), that permitting grandparent visitation would be in the best interests of the child. Tenn. Code Ann. § 36-6-306(c).

² Act of May 29, 1997, ch. 503, 1997 Tenn. Pub. Acts 918, codified at Tenn. Code Ann. § 36-6-306 & -307 (2005 & Supp.2007).

³ These circumstances include: (1) the father or the mother of the minor child is deceased, (2) the child’s mother and father are divorced, legally separated, or were never married, (3) the child’s mother or father has been missing for not less than six months, (4) a court of another state has granted the grandparents visitation, or (5) the child lived in the grandparent’s home for twelve months or more and was later removed by his or her parent.

The statute also addresses the circumstances that will support a finding that the child will suffer substantial harm if his or her grandparents are not granted visitation. Tenn. Code Ann. § 36-6-306(b)(1) provides that the court may find substantial harm if the child has a “significant existing relationship” with his or her grandparents and (A) the loss of that relationship is “likely to occasion severe emotional harm to the child,” (B) the grandparent functioned as a primary caregiver and that the cessation of that relationship “could interrupt provision of the daily needs of the child and thus occasion physical or emotional harm,” or (C) the loss of the relationship “presents the danger of other direct and substantial harm to the child.” In addition, Tenn. Code Ann. § 36-6-306(a)(5) establishes a rebuttable presumption of “irreparable harm”⁴ if the child has “resided in the home of the grandparent for a period of twelve (12) months or more.”

Larson, 2005 WL 2493478 at *4-5.

The *Larson* court determined the current grandparent visitation statute, the one at issue here, is not unconstitutional on its face. *Larson*, 2005 WL 2493478 at *5.⁵ Mr. McMillan’s challenge to the statute does not constitute an attack that the statute, on its face, is so obviously unconstitutional as to obviate the necessity for review by the trial court. Instead, Mr. McMillan’s challenge pertains to the application of the statute to the facts of this case. We, therefore, find the issue was waived when Mr. McMillan failed to raise it before the trial court. *Lawrence*, 655 S.W.2d at 929.

⁴We perceive a substantial difference between the “substantial harm” required by Tenn. Code Ann. § 36-6-306(b) and the “irreparable harm” required by Tenn. Code Ann. § 36-6-306(a)(5). This case does not require us to ascertain the full extent of this difference.

⁵The grandparent visitation statute is substantively unchanged since *Larson*. The only amendment to Tenn. Code Ann. § 36-6-306, effective July 1, 2007, merely substituted “circuit, chancery, general sessions courts with domestic relations jurisdiction or juvenile court in matters involving children born out of wedlock” for “circuit or chancery court” in the introductory paragraph of (a).

GRANDPARENT VISITATION

The trial court's decision concerning visitation is subject to a *de novo* standard of review with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Kendrick v. Shoemaker*, 90 S.W.3d 566, 569 (Tenn. 2002); *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn.1990). Moreover, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). This is because of the broad discretion given trial courts in matters of child custody, visitation and related issues. *Id.*; see also *Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001).

Presence of a Danger of Substantial Harm

To be entitled to visitation under the grandparent visitation statute, Mrs. Carr must first prove the existence of at least one of six circumstances outlined in the statute. Tenn. Code Ann. § 36-6-306(a)(1)-(6). These circumstances include:

(1) the father or mother of an unmarried minor child is deceased;

....

(5) the child resided in the home of the grandparent for a period of twelve months or more and was subsequently removed from the home by the parent or parents; or

(6) the child and the grandparent maintained a significant existing relationship for a period of twelve months or more immediately preceding severance of the relationship, this relationship was severed by the parent or parents for reasons other than abuse or presence of a danger of substantial harm to the child, and severance of this relationship is likely to occasion substantial emotional harm to the child.

Tenn. Code Ann. § 36-6-306(a). Mr. McMillan does not dispute the fact that Mrs. Carr's petition was properly before the court due to the fact the child's mother is deceased, the child resided in the home of Mrs. Carr for a period of twelve months, and the fact she had and has a significant relationship with the child.

If the court determines a petition for grandparent visitation is properly before the court, the court must then determine whether the "presence of a danger of substantial harm to the child" exists if the grandparent is not afforded visitation. Tenn. Code Ann. § 36-6-306(b)(1). To make the determination of substantial harm to the child, the statute provides the following:

Such finding of substantial harm may be based upon cessation of the relationship between an unmarried minor child and the child's grandparent if the court determines, upon proper proof, that:

(A) The child had such a significant existing relationship with the grandparent that loss of the relationship is likely to occasion severe emotional harm to the child;

(B) The grandparent functioned as a primary caregiver such that cessation of the relationship could interrupt provision of the daily needs of the child and thus occasion physical or emotional harm; or

(C) The child had a significant existing relationship with the grandparent and loss of the relationship presents the danger of other direct and substantial harm to the child.

Tenn. Code Ann. § 36-6-306(b)(1)(A)-(C). As the statute expressly provides, an expert witness is not required to establish a significant existing relationship between a grandparent and grandchild or that the loss of such relationship is likely to occasion severe emotional harm to the grandchild. Tenn. Code Ann. § 36-6-306(b)(3).

Father contends, however, that the trial court erred in finding the existence of substantial harm to the child if visitation were not ordered pursuant to Tenn. Code Ann. § 36-6-306.

A rebuttable presumption exists that denial of visitation may result in irreparable harm to the child if the child “resided in the home of the grandparent for a period of twelve (12) months or more and was subsequently removed from the home by the parent or parents.” Tenn. Code Ann. § 36-6-306(a)(5). The trial court correctly found that the child resided in Grandmother’s home for twelve months or longer, triggering the rebuttable presumption. The presumption created by Tenn. Code Ann. § 36-6-306(a)(5) is “prima facie proof of the fact presumed, and unless the fact thus established, prima facie, by legal presumption of its truth is disproved, it must stand as proved.” *Purkey v. Purkey*, No. 03A01-9707-CV-00317, 1998 WL 334406, at *3 (Tenn. Ct. App. June 25, 1998). With the benefit of the statutory presumption, Mrs. Carr established prima facie proof that denial of visitation may result in irreparable harm to the child if she is not awarded visitation.

Mr. McMillan offered no evidence to rebut the presumption that denial of visitation may result in irreparable harm to the child. Furthermore, there is absolutely no evidence in the record that Mrs. Carr poses a threat to the emotional or physical well-being of the child. In fact, the evidence is wholly to the contrary. Moreover, Mr. McMillan admits the fact that Mrs. Carr has a significant and positive relationship with the child and he readily admits that she was a great help to both him and the child during the extremely difficult period following the death of the child’s mother. Mr. McMillan’s sole argument in opposition to court-ordered visitation is that he is a good parent and therefore he alone should determine if and when Mrs. Carr is allowed visitation.

The statute requires that the petitioner prove a danger of substantial harm to the specific child with whom visitation is sought, not just to children in general. *Ottinger v. Ottinger*, No. E2003-02893-COA-R3-CV, 2004 WL 1626253, at *5 (Tenn. Ct. App. July 21, 2004). The statute also requires that the trial court consider “whether the facts of the particular case would lead a reasonable person to believe that there is a significant existing relationship between the grandparent and

grandchild or that the loss of the relationship is likely to occasion severe emotional harm to the child.” Tenn. Code Ann. § 36-6-306(b)(3).

The trial court found that “severance of the relationship would be a great abuse to the child,” that “substantial harm to the child would occur if the relationship was severed,” that “present dangers and substantial harm to the child if there was a cessation of the relationship between the child and Grandmother,” and that “cessation of this relationship is likely to occasion severe emotional harm to the child.”

It is undisputed that Mrs. Carr acted as a primary caregiver to the child at a very difficult and emotional time in the child’s life. The child lost his mother when he was only five years old, and Grandmother provided for his daily care both before and after this tragic occurrence. For a significant period of time, Mrs. Carr was the only mother-like figure in his life. After the death of his mother, the child often cried himself to sleep in the arms of Mrs. Carr. Her involvement was so significant that the child occasionally referred to her as mother. With Mr. McMillan offering no proof to rebut the presumption that irreparable harm would result from denial of visitation to Mrs. Carr, the record fully supports the trial court’s finding that irreparable harm would result to the child if Mrs. Carr was denied visitation.

Best Interests of the Child

If the trial court makes an initial finding of there being a danger of substantial harm to the child if visitation is not awarded to the grandparent, the trial court must then make a determination as to whether grandparent visitation would be in the best interests of the child. Tenn. Code Ann. § 36-6-306(c). In making the best interests determination, the trial court must consider all relevant factors, including, but not limited to, the following:

- (1) The length and quality of the prior relationship between the child and the grandparent and the role performed by the grandparent;
- (2) The existing emotional ties of the child to the grandparent;
- (3) The preference of the child if the child is determined to be of sufficient maturity to express a preference;
- (4) The effect of hostility between the grandparent and the parent of the child manifested before the child, and the willingness of the grandparent, except in case of abuse, to encourage a close relationship between the child and the parent or parents, or guardian or guardians of the child;
- (5) The good faith of the grandparent in filing the petition;
- (6) If the parents are divorced or separated, the time-sharing arrangement that exists between the parents with respect to the child; and

(7) If one (1) parent is deceased or missing, the fact that the grandparents requesting visitation are the parents of the deceased or missing person.

Tenn. Code Ann. § 36-6-307.

The record provides compelling proof of strong and positive emotional ties between the child and Mrs. Carr, which are understandable due to the fact she served as a primary caregiver for a substantial and critical period of the child's life. Mrs. Carr remains the child's only significant connection to his deceased mother and her family and there is no evidence to suggest that her petition was not filed in good faith. Considering all applicable factors, we find no error in the trial court's determination that visitation is in the best interests of the child.

The Visitation Schedule

If the trial court determines that visitation is in the best interests of the child, the court may then award the grandparent "reasonable" visitation. Tenn. Code Ann. § 36-6-306(c). The statute does not define "reasonable" or provide guidance as to factors to consider when ordering visitation.

Appellate review of a trial court's visitation order is governed by the abuse of discretion standard, with "the child's welfare given paramount consideration." *Smallwood v. Mann*, 205 S.W.3d 358, 361 (Tenn. 2006) (citing *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)).

The trial court granted Mrs. Carr seventy-eight days of annual visitation pursuant to a specific schedule. The schedule includes periods of week-long visitation in May, June, July, and August, some three-day weekends at other times of the year, and a portion of the Thanksgiving and Christmas holiday seasons. Although seventy-eight days a year appears to be on the high end of reasonable visitation, considering the facts of this case, the award of seventy-eight days of visitation does not constitute an abuse of discretion. There is, however, one component of the visitation schedule that appears to not be in the child's best interest, which is the week in May awarded to Mrs. Carr when the child is still attending school in Gallatin, Tennessee. Mrs. Carr resides in Bellevue, Tennessee, which is approximately forty miles from the child's school. Considering the distance and significant traffic delays that would impede the child's trip through Nashville, Tennessee, to school, we find it necessary to remand this one issue to the trial court for the court to reconsider whether it is in the best interest of the child to reside with his grandmother during the week in May while the child is attending school, or any other week when the child is in school.

We, therefore, affirm the visitation schedule fashioned by the trial court with the exception of the week in May the child is attending school and remand with instructions for the trial court to reconsider that aspect of the visitation schedule.

INJUNCTIONS AGAINST NON-PARTIES

Mr. McMillan's final issue on appeal is that the trial judge erred by issuing injunctions against persons who are not parties to this action. The Order states that "[a]ll of the parties involved including Grandmother, Father, the two grandfathers, Father's new wife and the extended families

of each are to say nothing negative about any of the other parties or the parties' families." The only parties to the instant action, however, are Mrs. Carr and Mr. McMillan.

Although it is clearly in the child's best interest for Ms. Simmons, as well as the extended families of the parties, to comply with the Order, they are not subject to the jurisdiction of the court and thus they, as non-parties, are not subject to the injunction. *See Henderson v. Mabry*, 838 S.W.2d 537, 541 (Tenn. Ct. App. 1992). Accordingly, on remand the trial court is instructed to modify the judgment to delete that portion of the Order that seeks to enjoin persons other than the parties to this action.

IN CONCLUSION

The judgment of the trial court is affirmed in part, and reversed in part, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against the appellant, Mr. McMillan.

FRANK G. CLEMENT, JR., JUDGE